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Reply Brief of Wright, Cox & Maury for Petitioner.

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Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 692.

JOHN McMULLEN, PETITIONER,

vs.

JULIA E. HOFFMAN, EXECUTRIX OF THE LAST WILL OF LEE HOFFMAN, DECEASED, RESPONDENT.

PETITIONER'S REPLY BRIEF.

R. PERCY WRIGHT,
L. B. COX,
WM. A. MAURY,
Attorneys for Petitioner.

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IN THE

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PETITIONER'S REPLY BRIEF.

Counsel for petitioner hardly deem it necessary to make reply to respondent's brief, interposing, as it seems to do, so little substantive ground of objection to the petition; but, although it so inadequately meets petitioner's argument, we do not wish to allow the positions taken to seem to stand as confessed.

We concede that the allowance of the writ here sought should be made only in cases of "gravity and importance," but we contend that the facts presented completely answer every requirement of this condition. We admit that the naked question as to whether respondent shall hold all the money in controversy in this suit or shall share it with

petitioner does not particularly concern any persons except themselves; does not present a case of general interest, and would not of itself warrant the allowance of our petition; but that is not the question presented for the consideration of the court, and the case is not to be determined upon any such circumscribed or fal[illegible] basis.

In Lau Ow Bew's case, cited in respondent's brief, the question whether or not he should be allowed to enter the United States or should be returned to China was one which directly affected him only, and this naked proposition would not have afforded sufficient ground for the allowance of the writ of certiorari which was applied for, but the larger question involved, viz., whether or not the acts of Congress and our treaty stipulations with China were being violated in *Lau Ow Bew's* case, was one of sufficient consequence to call for the relief sought. The object in view was to see that there was not a maladministration of the law, and Lau Ow Bew got his liberty as an incident of the proceeding. Just so here we complain that *in petitioner's case* the decisions of this court are not being recognized and followed in the ninth circuit, and this we present as the gravamen of our petition. Is it not a matter of "gravity and importance"? Could anything be of greater consequence or of greater public interest in the field of jurisprudence than the firm and inflexible maintenance and enforcement of the rules and principles of the supreme judicial tribunal of the land—than the uniform administration of the law? Could anything appeal more strongly to this court for the vindication of their own integrity and authority? There can be no question as to the gravity of the case presented and no room for the consideration of any proposition except as to whether or not the petitioner's contention is well grounded.

The petitioner does not at this time court any investigation of the facts of his case. He has noted his dissent from the conclusions reached by the court of appeals, but he has stated in his principal brief that he submits his petition upon the facts found by that court or upon any result of facts which might be drawn from the evidence by any reasonable construction. Consequently the suggestion made in respondent's brief to the effect that we are demanding the application of a different rule from that laid down by the court of appeals to a different state of facts from those found by that court has no place in the present discussion and need not be answered.

Counsel for respondent spend much time and space in presenting the case of *McBlair vs. Gibbes*, to which we made but incidental reference in our principal brief, and attempt in what seems to us a wholly unsuccessful way to distinguish the pending case from that of *Brooks vs. Martin*, upon which we do rely. Beyond this no effort is made to consider the authorities cited in our brief or to disprove their application to the points of this case.

There are two tangible propositions stated in respondent's brief (p. 8) upon which her whole case must stand or fall. It is said: "On the trial *the evidence disclosed the fact*, as found by the circuit court of appeals, that the contract which McMullen and Hoffman had with the city was procured by means that were illegal and fraudulent," and "that the fraud was in petitioner and Hoffman holding themselves out to said committee as rival bidders; that petitioner and Hoffman employed illegal means to obtain the award of said contract."

These are the propositions formulated in respondent's own language which are pertinent in our discussion. As a pri-

mary argument, we say it is not sufficient that " the evidence disclosed the fact " that the contract with the city was procured by fraudulent means. In cases of *par delictum* we understand the rule to be that the moving party cannot secure any affirmative relief against the other if he rests his demand upon a rotten foundation—if he must make out his case through the medium and by the aid of something which the law will not tolerate—and that if the plaintiff does not disclose the fact that his demand is thus infected the defendant may show that the plaintiff is dependent upon or " requires the aid of " *the illegal thing* as a condition of success. But this is a purely defensive weapon. Neither party can gain any advantage from his situation except by uncovering, when attacked by the other, the inherent weakness of his adversary's case. Neither can make a merit of their common state nor get any benefit from it except in this indirect way, and the salient vice of the decision which the petitioner seeks to have reviewed is that it was in nowise shown by either the petitioner or the respondent that the petitioner's case was dependent upon, or that he required the aid of, the matters which the respondent claims were fraudulent for the enforcement of his demand, and yet the respondent was allowed to make a merit of the common fraud (so found), and thus, independently of the necessities of the petitioner's case, to defeat his recovery.

A further answer to respondent's proposition is equally conclusive. The respondent, speaking in accord with the court of appeals, has located this fraud as resting in the action of petitioner and Hoffman touching the submission of bids and securing " the award of the contract." For the sake of the argument, granting this to be true, the peti-

tioner contends that this was a distinctive "transaction," while the respondent insists it was an inherent part and parcel of the partnership agreement between Hoffman and petitioner:

"That it was as much a part of the real partnership agreement, although omitted from the written paper, that the parties should practice the fraud which the court has found was practiced in fact as it was to execute any part of the work if by means of the fraud the contract should be secured."

Brief, pp. 8, 9.

The respondent's proposition, then, plainly stated, is this: Hoffman and petitioner entered into a contract with each other embodying two covenants, one to practice a fraud upon the city of Portland for the purpose of securing the work under consideration, and the other to execute the work and divide the profits. The first, which is the objectionable one, the parties executed themselves without appealing to any court; the second, which is in itself unobjectionable, has given birth to this suit. Taking the engagement between the parties, as stated, the result is that as the case stood when the preliminary agreement for a partnership was entered into neither Hoffman nor petitioner could have been compelled to make the bid; but, having made it and thus performed the objectionable portion of the agreement, neither of the parties, as towards the city of Portland or as between themselves, could refuse to perform the valid portion of the contract.

With regard to the quotation from a letter which counsel for respondent print at this point, we feel warranted in saying from the record that it was written some five months

after the contract under consideration had been secured, had reference to another matter, with which Hoffman declined to have anything to do, the foundation for its introduction was stricken out of the pleadings by the circuit court, and it is not a legitimate subject for consideration in this connection.

We beg permission to say, that a fundamental mistake committed by the learned Circuit Court of Appeals lay in attempting to establish an identity between contracts to commit felonies and share the fruits thereof and contracts to do things not necessarily harmful in the particular case, but objectionable because of some tendency to induce a public inconvenience, as in this very case, where Hoffman's executrix is seeking to evade just responsibility by setting up illegality in the agreement with McMullen for procuring the contract with the City of Portland,—a contract which has proved beneficial to the City, and against which the City has never raised any complaint. The books are full of instances of such contracts, such as contracts to insure seamen's wages, contracts tending to create a perpetuity, contracts in restraint of trade, limitations of estates dependent on a certain person being raised to the peerage, and many others collected in the opinions in the celebrated case of Egerton *vs.* Earl Brownlow (4 H. Lds. Cas. 1).

These particulars have been entered upon in order to make more apparent the wide gulf that separates this class of contracts from that of contracts or conspiracies to commit felonies.

Failing to note this distinction, the Court below dignifies, by making a part of its opinion, the following extravagant attempt of the Supreme Court of North Carolina, in King

vs. Winants, (71 N. C., 469, 474,) to run a parallel between the two classes of contracts:

> "Two men enter into a conspiracy to rob on the highway, and they do rob; and, while one is holding the traveler, the other rifles his pocket of $1,000, and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a Court of justice hear them? No case can be found where a Court has allowed itself to be so abused. Now, if these robbers had taken the $1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the Court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of Brooks *vs.* Martin, *supra*, so much relied on by plaintiff."

Common sense revolts at the bare suggestion, that Brooks *vs.* Martin and the supposed case stand on the same footing. The latter relates to a heinous crime, destructive of the public peace and the sacred principle of property—a crime leveled at the very fabric of government, and belonging to a class where the earlier law allowed no civil redress to the individual injured against the wrongdoer, and where the later law suspends the right to such redress until after the wrongdoer shall have been convicted or acquitted of the offense charged. (See Higgins *vs.* Butcher, Yelv., 90*a*, note 2, Metcalf's Ed., Andover, 1820.)

If now the offense to the party robbed, in the case supposed, became, at common law, drowned or merged in the "offense to the Crown," it may well be questioned whether any action would lie by one participant in the robbery against the other for his share of the fruits of the crime, under any circumstances whatever, so long as the fruits could be traced.

In King *vs.* Winants (*supra*) the plaintiff and defendant agreed not to bid against each other for a government contract to be given to the lowest bidder, and to share the profits of the contract when given to one of them, and the contract having been awarded to the defendant it was held that the plaintiff could not maintain an action to bring him to an accounting for the profits, the contract being against public policy and void.

It is to be noted that the court were not unanimous, Rodman, J., having dissented on the grounds that "*this case cannot be distinguished from Brooks vs. Martin*, 2 Wall., 70," and that "*the plaintiff can make out his case without going into proof of the fraudulent transactions.*"

Now it is in this case that we find the genesis of the idea, that before an action can be maintained, for the division of the profits of an illegal contract, by one party to the contract against another, there must have been some transformation of those profits into something different from what they were when first earned. Nor is it remarkable that a court, unable to perceive the difference between an action for the profits of a contract to commit a felony and one for the profits of a contract to do something not necessarily harmful or objectionable in itself, but having a tendency more or less detrimental to the public good, should have advanced this doctrine of transubstantiation, and then argued itself into the conviction that it was only enforcing the doctrine of Brooks *vs.* Martin.

The court below having been captivated by the parallel instituted by the North Carolina court between actions to share profits earned under contracts to commit felonies, and similar actions under contracts against public policy, natu-

rally fell a victim to the auxiliary doctrine of transubstantiation, and, as the former court had done, attempted to explain away Brooks *vs.* Martin and other decisions of this court of the same character.

It is true some of the scrip, in that case, had been regularly assigned by the soldier himself, or had been located on public land, some of which had been sold and conveyed away, and notes and mortgages taken for the unpaid purchase-money, but clearly these were *purely adventitious circumstances*, noticed, to be sure, by the court, but not entering into the *ratio decidendi* of its decision.

As this Court says, remarking on the case of Tenant *vs.* Elliot (1 B. & P., 3), "the plaintiff recovered, on the ground that the implied promise of the defendant arising out of the receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction" (McBlair *vs.* Gibbes, 17 How., 232, 236), thus effectually disposing of the new-born theory that the fruits of an illegal enterprise must undergo some transformation before any duty to share them with another will support an action.

This single remark of the Court shows that if none of the circumstances in Brooks *vs.* Martin had existed the decision of that case must have been the same as it was.

Returning now to the case in hand, the moment the money earned by McMullen and Hoffman came into the hands of the latter, the law raised an implied contract in favor of McMullen to have his share of it paid over to him. This implied contract was wholly independent of the express contract, said to be infected with illegality, and made it entirely feasible for McMullen to bring Hoffman to an accounting, without invoking the so-styled illegal contract.

It is a *concessum* in the case that if Hoffman had admitted his liability to account to McMullen or had expressly agreed to pay him his share of the profits after receiving them, a bill, like the present one, would have been maintainable, which gives up the case, because the implied contract has all the potency of an express undertaking, being, as this court say in McBlair *vs.* Gibbes (*supra*), "*not affected by the illegality of the original transaction.*"

It is apparent, therefore, that our right to the *certiorari* is made out without controverting a single conclusion of fact deduced by the learned circuit court of appeals from the testimony—in other words, our application is not imperilled by admitting all the turpitude imputed to the transactions between McMullen and Hoffman with reference to obtaining and executing the contract with the City of Portland. It is thus gratifying to know, that the application may be allowed without the trouble of looking into the testimony.

In their review of *Brooks vs. Martin* and their attempt to distinguish it from the pending case counsel for respondent advance some very untenable propositions and some which are extraordinary. It is said (brief, pp. 12, 13) that there is presented "a condition so unlike the case now before the court as to make the rule there laid down inapplicable here. In that case the only illegal act was the purchase of soldiers' scrip. The act was illegal only because the statute authorizing the scrip to be issued and donating it to the soldiers declared that its sale should be void. * * * No element of public policy was involved in the act of purchasing the scrip. It was, nevertheless, an illegal transaction, because if entered into the law would not uphold it.

"The facts as they appeared in that case were that such

scrip was purchased in considerable amounts with money which Martin furnished, and was delivered to Brooks, the active member of the partnership. This purchase completed the illegal transaction. The title to the scrip, as against everybody but the soldier, was in the purchaser. Thus possessed of the property, Brooks proceeded by legitimate steps, in no manner connected with or dependent upon or in execution of the illegal contract of purchase, to and did carry the scrip and the proceeds of the sale of it through, step after step, of lawful business transactions until considerable profits had been realized. He presented the scrip to the department at Washington, where the title was recognized in him, and warrants for the land to which the holder of the scrip was entitled were issued to him. These warrants were afterwards laid upon lands. The lands, many of them, were sold, money realized from the sale, and afterwards loaned on mortgages. Every step along the whole line, after the purchase of the scrip, was a legal and legitimate use of the money in the hands of the partnership, and the profits sought in that case to be recovered were the result of and had been realized from these legitimate transactions, every one of which, as has been stated, was independent of and unaffected by and in no way in aid of the execution of the illegal contract. To this state of facts the court laid down the rule in *Brooks vs. Martin.*"

It seems to us it would be an exceedingly difficult matter to frame an argument so utterly irresponsive to the point sought to be established, and, indeed, every line and word of it supports the contention of petitioner and shows the controlling influence of *Brooks vs. Martin* upon this case.

It is said the only illegal act was the purchase of soldiers'

scrip; that it did not involve any element of public policy; that it was "an illegal transaction;" that every subsequent step was legitimate; that the use of the moneys derived from this illegal source was lawful, and that the court was properly invoked to decree its distribution between the parties.

With this analysis of and comment upon *Brooks vs. Martin*, counsel for respondent urge that it is not applicable to the pending case!

The effect of the act of Congress declaring that sales of scrip were void was to make such sales unlawful, and Mr. Justice Miller says that "the traffic in which this firm engaged" was "illegal." Therefore both the partnership agreement and the operations of the firm were unlawful. The subject of their operations, out of which they made their profits, was under the ban of the law. The parties were violating public policy and it was involved in the case, for every infraction of law is obnoxious to public policy. The acquisition of their stock in trade is characterized by respondent's counsel as a "transaction" which did not affect their subsequent operations. All that is contended for by respondent's counsel in the pending case is that the stock in trade of the firm was acquired fraudulently, and yet it is urged that this factor is fatal to petitioner's right to recover, while in *Brooks vs. Martin* the same thing is of no consequence; that it is a "transaction" in the one case and a contract in the other.

The only distinguishing element between this case and that of *Brooks vs. Martin*, which is designated in respondent's brief, is that no public interest was involved in the operations of Brooks and his associates, the sale of the scrip

not involving any question of moral turpitude and being only forbidden by statute, while in the pending case the acts complained of are inherently wrong, and the general public is interested in them. The law is that the same general rule applies to both classes of cases, and this attempted distinction cannot be made good. The general public was interested in the violation of the law by Brooks and his associates. As well say that if A steals B's horse, or if A commits perjury against B on the trial of a case, the general public is not interested. B has lost his property in the first instance and may have sustained pecuniary injury in the second, either of which may be made good to him by payment of the value of the damage he has suffered; but the public has an interest beyond that of B, viz., in the maintenance of order and the welfare of society; so in regard to the sale of the soldiers' scrip the public had an interest in the violation of the law, although the offense was not made infamous and no punishment was provided for its commission.

Placing respondent's construction upon the attitude of Hoffman and petitioner, which we adopt for the purposes of argument, but not otherwise, this case is absolutely undistinguishable from *Brooks vs. Martin.* In that case the partnership was formed to buy up soldiers' claims in violation of law, and was therefore a partnership created for the conduct of an illegal business, and every act (such as the conversion of scrip into warrants and the location of the warrants) performed by the partnership, down to the division of the profits, was in consummation and fruition of the illegal purchase of soldiers' claims. This court expressly recognized the illegal character of the transactions and expressly stated (opinion, pp. 78, 79, quoted in our principal

brief, pp. 8–10) that they would not lend their aid to either party in the execution of the illegal portions of their transactions, but it was held that when such illegal portions had been performed the division of the profits resulting therefrom, which were the common property of the partners, would be enforced. This was allowed on the principle, well stated in the brief of Mr. Carpenter in that case, that "the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction."

Now, in the present case, according to respondent's contention, there was a partnership formed to do an unlawful thing. This was accomplished when the bidding was closed, just as (according to their theory) the illegal thing in *Brooks vs. Martin* was accomplished when the scrip was purchased. The title to the city's contract, as against everybody but the city of Portland, was in Hoffman and petitioner. They went on and in a lawful manner performed the work covered by the contract and earned the money agreed to be paid therefor. There was nothing further unlawful in their agreement, nor was any illegal act performed in the execution of their work. How in the name of reason can it be consistently contended that when a like wrong had been committed in each case, according to the argument of counsel for respondent, the subsequent operations of the parties in the pending controversy were infected with illegality, so that petitioner cannot recover from respondent his share of the profits, while in *Brooks vs. Martin* the subsequent operations of the parties and Martin's right to recover his share of the profits were free from taint? How can it be said that in *Brooks vs. Martin* every one of "these legitimate transactions"

"was independent of and unaffected by and in no way in aid of the execution of the illegal contract," while in the pending case transactions every whit as legitimate *were* dependent upon, *were* affected by, and *were* in aid of the execution of the illegal contract? A position so inconsistent and illogical can stand no otherwise than as an absurdity. The only difference between the character of the subsequent proceedings in the two cases is that in the one *the nature of the case* called for the location of the warrants and the sale of the lands, while in the other *the nature of the case* called for the manufacture and laying of the pipes.

Following this attempted distinction, counsel for respondent drift of into confusion by arguing (brief, p. 13) that "if the course shown to have been pursued in securing this contract can have the aid of the courts to uphold it *and the contracts so secured can be enforced*," dire results will follow.

The matter of the enforcement of this contract (*i. e.*, the contract with the city) is not before the court. What the city might have done in withstanding both Hoffman and petitioner, if the matters urged by respondent were true, is a very different thing from what the respondent may do in a controversy with petitioner. In fact the city seems not to have been dissatisfied with the situation and did nothing but pay over the amount of money earned on the contract. This failure to discriminate between the attitude of the city and that of respondent is only a cause of obscurity and is a decided detriment, rather than an aid, in reaching correct conclusions upon the issues involved in the pending case.

We read in respondent's brief again (p. 14):

"The cases cited by counsel are those only in which the illegality complained of was the violation of some statute or some act of like nature."

This declaration betokens at least an indifference in examining the authorities cited in our principal brief which was not to be expected in a matter of such consequence.

In *Planters' Bank vs. Union Bank*, while the parties violated an act of Congress in dealing in Confederate securities, viewing the matter from the standpoint of the Government, their conduct was inherently wrong in that it lent aid to the enemies of the United States while a state of war was prevailing.

In *Railroad Company vs. Durant* there was a violation on the part of a quasi-public officer of the duties of a fiduciary position, whereby individual gain had accrued to himself.

In *Wann vs. Kelly* the parties had engaged in stock-gambling transactions.

In *Western Union Telegraph Company vs. Union Pacific Railway Company* the facts were nearly akin to those in Durant's case.

In every one of these instances there was a violation of public policy just as clear as it can possibly be claimed to exist in the pending case, and this violation was in nowise dependent upon the question of statute or no statute.

Counsel for respondent say again (brief, p. 13): "Not a case is cited by counsel for petitioner growing out of or based upon a state of facts bearing any near resemblance to the facts in the case of *McMullen vs. Hoffman*." It would be a sufficient answer to say that the facts of the pending case quite as nearly resemble those of the cases cited, as the facts in any of those cases (save two) considered together resemble each other, and yet the same rule was applied in them all. This is an argument which neither proves nor disproves anything. General principles are not dependent in

their operation upon the discovery of an identity of detailed facts or conditions. If this were so, we would have only the law of cases and not the law of questions.

In every one of the decisions of this court and of other Federal courts cited by us in our principal brief there was an engagement between parties involving an element of illegality, but in every one of them the moving party was allowed to recover on the ground that the parties themselves had passed the objectionable stage before coming into court, and it was no matter of pollution for the court to operate upon the other features of their relationship. This is a sufficient similarity of facts.

Counsel for respondent do not attempt to justify the opinion of the court of appeals or to demonstrate its soundness, but are content to refer to it (brief, p. 14) as presenting a case of *res ipsa loquitur*. In this position we fully agree with the counsel. In our view the decision stands entirely alone and cannot be supported. We have already pointed out our grounds of objection to the principles announced in the opinion.

With regard to what we have heretofore submitted touching the claims made by petitioner upon assets other than the immediate results of the principal contract, we simply say that we are fully conscious of the fact that these matters of themselves do not present a sufficient cause for the allowance of the writ.

But such cases are addressed to the discretion of the court, and we think that a legitimate consideration is that the result of the decision operates as *an absolute denial of justice* to the party complaining of it.

In this connection it may be added that the statements

made in respondent's brief as to these matters are not accurate. The item of extra work is not for work which is not "specified" in the contract, as stated on page 15 of their brief, but is for wood not "under" the contract, as is set forth in the stipulation of facts entered into between counsel for both parties, found on page 119, volume 1, of the record. These items have nothing to do with modifications of the principal contract, as is contended by respondent. The original contract price was $465,667, the modifications increased it to $509,825.22, and all the items under consideration are still outside of this figure. We quote from this stipulation of facts:

"That the total sum earned under said contract and the extra work required by and allowed for by the city is, viz: *under* the contract, $509,825.22; extra work *not under contract*, $14,496.74, making a total earned and allowed, $524,321.96."

Following this is the stipulation that from the store, boarding camp, etc., a further profit of $15,339.76 was realized, "making the total amount paid, added to the amount earned, allowed, and unpaid, $539,661.72."

We respectfully submit to the court that the petitioner has made a good case for the allowance of the writ sought.

R. Percy Wright,
L. B. Cox,
Wm. A. Maury,
Attorneys for Petitioner.